

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

NORFOLK SOUTHERN RAILWAY COMPANY

Plaintiff,

vs.

CITY OF PITTSBURGH

Defendant.

CIVIL DIVISION

No.: GD 18-006431

COMPLAINT IN CIVIL ACTION

Filed on behalf of Plaintiff,
Norfolk Southern Railway Company

Counsel of record for this party:

J. Lawson Johnston, Esquire
P.A. I.D. #19792

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P.A. I.D. # 78529

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JURY TRIAL DEMANDED

DEPT OF COURT RECORDS
CIVIL DIVISION
ALLEGHENY COUNTY, PA

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FILED

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NORFOLK SOUTHERN RAILWAY
COMPANY,

CIVIL DIVISION

Docket No. GD 18-006431

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Defendant.

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. IF YOU WISH TO DEFEND AGAINST THE CLAIMS SET FORTH IN THE FOLLOWING PAGES, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS AFTER THIS COMPLAINT AND NOTICE ARE SERVED BY ENTERING A WRITTEN APPEARANCE PERSONALLY, OR BY AN ATTORNEY, AND FILING IN WRITING WITH THE COURT YOUR DEFENSES OR OBJECTIONS TO THE CLAIMS SET FORTH AGAINST YOU. YOU ARE WARNED THAT IF YOU FAIL TO DO SO, THE CASE MAY PROCEED WITHOUT YOU AND A JUDGMENT MAY BE ENTERED AGAINST YOU BY THE COURT WITHOUT FURTHER NOTICE FOR ANY MONEY CLAIMED IN THE COMPLAINT OR FOR ANY CLAIM OR RELIEF REQUESTED BY THE DEFENDANT. YOU MAY LOSE MONEY OR PROPERTY OR OTHER RIGHTS IMPORTANT TO YOU.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Lawyer Referral Service
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11th Floor Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
(412) 261-5555

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NORFOLK SOUTHERN RAILWAY
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COMPLAINT IN CIVIL ACTION

AND NOW comes Plaintiff, Norfolk Southern Railway Company, by and through its counsel, Dickie, McCamey & Chilcote, P.C., and files the within Complaint, averring as follows:

1. Plaintiff Norfolk Southern Railway Company (hereinafter "NSRC") is a corporation duly organized and existing under the laws of the Commonwealth of Virginia and does business in the Commonwealth of Pennsylvania. NSRC's principal place of business is located at Three Commercial Place, Norfolk, VA 23510-9242.

2. NSRC is a common carrier by rail and operates freight trains in interstate commerce between the different states of the United States, including in the city of Pittsburgh, Allegheny County, Pennsylvania.

3. Defendant City of Pittsburgh (herein after the "City") is a government entity with an office and principal place of business at 414 Grant Street, Suite 313, Pittsburgh, Pennsylvania 15219.

4. All events giving rise to this action occurred within the city of Pittsburgh, Allegheny County, Pennsylvania.

5. At all times relevant hereto, the City owned, possessed and controlled certain real property in the vicinity of Mt. Washington, city of Pittsburgh, Allegheny County, identified as Parcel ID number 0001-P-00400-000-00 (hereinafter the "Property") located above, adjacent to, and/or near NSRC's Monongahela rail line (hereinafter "Mon Line").

6. NSRC owns the real property and tracks along the Mon Line in the city of Pittsburgh, over which it operates a double-stack intermodal route connecting the Northeastern United States and the Midwest.

7. NSRC operates daily over the Mon Line between thirty (30) to forty (40) freight trains, some of which may contain hazardous materials.

8. As the owner and possessor of the Property, the City was required at all times relevant hereto to maintain the Property in a state of repair.

9. As a result of the City's failure to maintain the Property, specifically that portion that sits directly above and adjacent to NSRC's Mon Line at or near mile post 5.5, rockslides originating from the Property occurred on or about May 8, 2016 and on or about June 28, 2016, at which times boulders, rocks, and other debris fell from the Property down onto and across NSRC's Mon Line.

10. As a result of each of these distinct occurrences, NSRC's business operations on this vital link across its network were interrupted causing delays and a bottleneck in rail traffic at significant expense to NSRC.

11. As a further result of these rockslides, NSRC sustained damage to its property and track, and NSRC maintenance of way crews supplemented by contractors engaged by NSRC worked around the clock to repair the damage and restore the track so that rail traffic could resume.

12. Despite notice from NSRC concerning the risk of further rockslides originating from the Property, the City refused to perform sufficient maintenance and/or repairs to stabilize the Property.

13. Instead, the City authorized NSRC to undertake blasting operations and repair efforts to remove the immediate danger posed to the adjacent NSRC tracks from the condition of the Property after the June 28, 2016 rockslide, and NSRC undertook that work on the City's Property on or about July 6, 2016.

14. In order to undertake this work on the Property to protect its adjacent railroad from the conditions created by the June 28, 2016 rockslide, NSRC hired multiple contractors at significant expense to inspect the Property, perform the blasting and repair work, and to remove boulders, rock, and other debris that endangered the adjacent railroad tracks.

15. Because NSRC's blasting, repair, and removal efforts of July 2016 were not a full solution to prevent future rockslides, NSRC requested that the City take immediate action to further repair and/or stabilize the Property to prevent the risk of injury, derailment, and business interruption resulting from future rockslides.

16. Notwithstanding, the City has failed to undertake any further repairs or stabilization efforts at the Property, and, upon information and belief, has not undertaken any geotechnical studies.

17. NSRC has complied with all notice requirements as set forth in 42 Pa. C.S. §5522.

18. The City is subject to liability as set forth herein pursuant to the real property exception of the Political Subdivision Tort Claims Act. 42 Pa. C.S. §8542(b)(3).

COUNT I- NEGLIGENCE

19. NSRC hereby incorporates by reference paragraphs 1 through 18 of the within Complaint as if the same were fully set forth at length herein.

20. The City had a duty to maintain the Property so as not to cause injury, harm, and/or damage to adjoining landowners such as NSRC.

21. The rockslides of May 8, 2016 and June 28, 2016 were caused by the negligence and carelessness of the City, as set forth hereafter, and in no way were caused by NSRC.

22. Both the May 8, 2016 and June 28, 2016 rockslides and resultant injuries and damages sustained by NSRC were the direct and proximate result of the negligence and carelessness of the City as follows:

- a. In failing to conduct reasonable inspections of the Property;
- b. In failing to properly maintain, repair, and/or stabilize the Property;
- c. In failing to warn Plaintiff of an imminent risk of harm when the City knew or should have known of the potential for rockslides originating from the Property;
- d. In failing to properly maintain, repair and/or stabilize the Property after the May 16, 2016 rockslide
- e. In allowing a dangerous condition to exist after receiving actual notice thereof;
- f. In obstructing Plaintiff's track and right of way;
- g. In exposing Plaintiff and others to an unreasonable risk of harm;

23. As a direct and proximate result of the City's negligence and carelessness, NSRC sustained various damages and expenses, including but not limited to damages to its property, track, and right of way; damages for business interruption and the delay of rail

traffic; labor and material expenses; costs incurred relating to blasting, repair, and removal work at the City's Property; and other direct and consequential damages.

WHEREFORE, Plaintiff, Norfolk Southern Railway Company, demands judgment in its favor, and against the Defendant, in an amount in excess of the jurisdictional limits for arbitration, together with costs, interest, and any further and additional relief that this Honorable Court deems appropriate.

COUNT II – PUBLIC NUISANCE

24. NSRC hereby incorporates by reference paragraphs 1 through 23 of the within Complaint as if the same were fully set forth at length herein.

25. The public has the right to public safety, including the right not to be exposed to hazardous materials, and the right to travel safely across the land and roadways located below the Property.

26. At least one vehicular accident has occurred on West Carson Street, located below the Property, wherein a private individual struck a boulder on the public highway that fell as a result of a rockslide emanating from the Property.

27. NSRC shares in the right to safely traverse the land located below the Property, particularly along its Mon Line.

28. NSRC has a common carrier obligation over the Mon Line and must ship regulated commodities upon reasonable request, and the public receives benefit from the transportation of cargo by rail on NSRC's Mon Line.

29. By failing and refusing to inspect, maintain, and stabilize the Property, the City has perpetuated a public nuisance that unreasonably and significantly interferes with the rights and safety of NSRC, its employees, and the general public.

30. NSRC has been specifically injured and threatened by the public nuisance and has suffered a harm of a kind different from that suffered by other members of the public.

The City's failure and refusal to inspect, maintain, and stabilize the Property has:

- a. Created an imminent danger and threat of a rockslide from the Property, which will likely result in further disruption of NSRC's operations and bottleneck in rail traffic, and/or damage to the Mon Line;
- b. Endangered NSRC's property and risked bodily harm or death to NSRC's employees and/or the public; and
- c. Forced NSRC to expend substantial funds to perform blasting operations, inspections, and other repair efforts on the City's Property.

WHEREFORE, Plaintiff, Norfolk Southern Railway Company, demands judgment in its favor and against the Defendant, in an amount in excess of the jurisdictional limits for arbitration, together with costs, interest, and any further and additional relief that this Honorable Court deems appropriate.

COUNT III – PRIVATE NUISANCE

31. NSRC hereby incorporates by reference paragraphs 1 through 30 of the within Complaint as if the same were fully set forth at length herein.

32. The May 8, 2018 and June 28, 2016 rockslides, caused by the City's negligence and carelessness, is a private nuisance that interfered with NSRC's private use and enjoyment of its land, including the Mon Line, and caused substantial damages to NSRC's property.

33. Despite notice of previous rockslides, the City failed to take reasonable action to remove the nuisance.

34. The City has intentionally and unreasonably interfered with NSRC's use and enjoyment of its property by failing and refusing to take corrective or remedial action with respect to the conditions of the Property.

35. As a direct and proximate result of the rockslides, and the City's failure to abate the nuisance, NSRC sustained various damages and expenses, including but not limited to, damages to its property, track, and right of way; damages for business interruption and the delay of rail traffic; labor and material expenses; costs incurred relating to blasting, repair, and removal work on the Property; and other direct and consequential damages.

WHEREFORE, Plaintiff, Norfolk Southern Railway Company, demands judgment in its favor and against the Defendant, in an amount in excess of the jurisdictional limits for arbitration, together with costs, interest, and any further and additional relief that this Honorable Court deems appropriate.

COUNT IV – MANDATORY INJUNCTION

36. NSRC hereby incorporates by reference paragraphs 1 through 35 of the within Complaint as if the same were fully set forth at length herein.

37. The City owns, possesses, and controls the Property.

38. The Property requires reasonable and periodic inspection and maintenance.

39. The City's refusal to inspect and maintain the Property, particularly in the face of actual notice provided by NSRC of rockslides originating from the Property, constitutes bad faith.

40. Indeed, the City rejected an express request from NSRC to perform any repair work subsequent to the June 28, 2016 rockslide either to prevent future rockslides or to remedy the June 28, 2016 rockslide.

41. Consequently, in order to mitigate its own damages occurring as a result of the June 2016 rockslide and to attempt to minimize the danger to the railroad created by the loose rock remaining on the Property, NSRC performed the costly blasting, clean-up, and other repair efforts to the Property.

42. Despite these efforts, the Property still requires regular and periodic inspection and maintenance, and the risk of future rockslides remains.

43. An award of economic damages alone would be inadequate in light of the danger to NSRC's employees, agents, and other individuals working on or near or traveling near the Mon Line, which regularly transports hazardous materials, that would result from the City's continued failure to properly maintain the Property.

44. NSRC would be irreparably harmed if the City does not adequately inspect and maintain the Property, as there is a presently existing actual threat of personal injury or death to NSRC employees and the public resulting from a rockslide emanating from the Property.

45. NSRC's right to relief on the basis of the City's negligence and nuisance is clear as the City has failed to comply with its duty to reasonably maintain the Property, resulting in damages to NSRC and the loss and enjoyment of its own adjoining property.

46. In order to ensure the Property does not continue to create rockslides, the City must engage in reasonable, periodic inspection of the Property, and stabilize, repair, and maintain the Property as necessary.

47. An injunction is necessary in order to mandate the City's compliance with its duties to reasonably inspect and maintain the Property.

48. Greater injury will result to NSRC and others from refusing to grant an injunction as the City exclusively owns, possesses, and controls the Property, from which future rockslides would result in interruption in the operations of the Plaintiff and potential injury to individuals on or below the Property.

49. The injunction will restore the status quo between the NSRC and the City as NSRC will be able to safely conduct operations on its Mon Line.

WHEREFORE, Plaintiff, Norfolk Southern Railway Company, demands a permanent, mandatory injunction be issued in its favor and against the Defendant.

COUNT V – UNJUST ENRICHMENT

50. NSRC hereby incorporates by reference paragraphs 1 through 49 of the within Complaint as if the same were fully set forth at length herein.

51. On or about July 6, 2016, NSR expended substantial costs to inspect the Property, perform blasting and repair work, and to remove boulders, rock, and other debris from the Property.

52. As a result, the City enjoyed the benefit of improvements to the Property at the expense of NSRC.

53. Despite the benefits conferred to the City, the City has not paid NSRC for the improvements.

54. The improvements were necessary to diminish the obvious risk associated with loose rocks remaining on the Property following the June 28, 2016 rockslide.

55. It would be inequitable for the City to continue to enjoy the value of the improved Property without compensation to NSRC.

WHEREFORE, Plaintiff, Norfolk Southern Railway Company, demands judgment in its favor and against the Defendant, the City, in an amount in excess of the jurisdictional limits for arbitration, together with costs, interest, and any further and additional relief that this Honorable Court deems appropriate.

COUNT VI - QUANTUM MERUIT

56. NSRC hereby incorporates by reference paragraphs 1 through 55 of the within Complaint as if the same were fully set forth at length herein.

57. The City authorized and accepted the repair and maintenance work undertaken by NSRC to the Property on July 6, 2018, and NSRC expected to be paid by the City in full.

58. The City received the benefit of NSRC's repair, blasting, and removal work on the Property without compensation paid to NSRC.

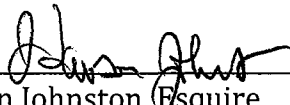
59. The City has not paid NSRC for the repair, blasting, and removal work performed on or about July 6, 2016 and, therefore, the City has been unjustly enriched in an amount in excess of \$1,100,000.00.

WHEREFORE, Plaintiff, Norfolk Southern Railway, demands judgment in its favor and against the Defendant in an amount in excess of the jurisdictional limits for arbitration, together with costs, interest, and any further and additional relief that this Honorable Court deems appropriate.

JURY TRIAL DEMANDED

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By:  _____

J. Lawson Johnston, Esquire

PA I.D.# 19792

Scott D. Clements, Esquire

PA I.D.# 78529

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Counsel for Plaintiff,

Norfolk Southern Railway Company

VERIFICATION

I, Cheri L. Bradley, Manager of Claims Litigation for Norfolk Southern Corporation, have read the foregoing Complaint in Civil Action. The information or statements contained therein came from various sources and are correct to the best of my knowledge or information and belief, although I have no personal knowledge of said information.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

Cheri L. Bradley
Cheri L. Bradley

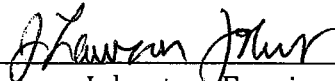
DATED: December 7, 2018

CERTIFICATE OF SERVICE

I, J. Lawson Johnston, Esquire, hereby certify that a true and correct copy of the foregoing COMPLAINT IN CIVIL ACTION has been served this 7th day of December, 2018, by hand delivery, to the following counsel of record:

Lawrence H. Baumiller, Assistant City Solicitor
Yvonne S. Hilton, Acting City Solicitor
City of Pittsburgh
Department of Law
313 City-County Building
414 Grant Street
Pittsburgh, PA 15219

DICKIE, McCAMEY & CHILCOTE, P.C.


By 
J. Lawson Johnston, Esquire
PA I.D.# 19792
Scott D. Clements, Esquire
PA I.D.# 78529
Aaron M. Ponzo, Esquire
P.A. I.D. #203584

*Counsel for Plaintiff,
Norfolk Southern Railway Company*

CERTIFICATE OF COMPLIANCE

"I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents."

Submitted by: J. Lawson Johnston

Signature: 

Name: J. Lawson Johnston

Attorney No. (if applicable): 19792